IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

KELVIN BARNETT,
Appellant.

No. 2 CA-CR 2013-0300
Filed June 16, 2014

Appeal from the Superior Court in Pinal County
No. S1100CR201201734
The Honorable Boyd T. Johnson, Judge

AFFIRMED IN PART; VACATED AND REMANDED IN PART

COUNSEL

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Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Lynn T. Hamilton, Mesa
Counsel for Appellant

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Howard concurred.

M I L L E R, Judge:

¶1 Kelvin Barnett was convicted after a jury trial of drug-related charges and tampering with a witness and was sentenced to a total of 39.5 years in prison. On appeal, he contends the trial court erred by failing to inquire on the record if he wished to testify, and denying his motion for judgment of acquittal on the witness tampering charge, pursuant to Rule 20, Ariz. R. Crim. P. For the following reasons, we vacate Barnett's conviction for witness tampering, modify the judgment, and remand for sentencing on the lesser-included offense. We otherwise affirm Barnett's convictions and sentences.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the jury's verdicts. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In February 2012, J.K. agreed to attempt to buy methamphetamine from Barnett as part of an agreement with the Casa Grande police department to avoid her own drug paraphernalia charges. J.K. called Barnett, who told her to meet him at a local store. Detectives gave J.K. a listening device to wear and dropped her off near the location of the meeting. J.K. gave Barnett money and he sent her into a motel room to get the methamphetamine from someone else. J.K. received two small bags of methamphetamine.

¶3 While J.K. was walking back to where the police had dropped her off, Barnett followed her in his vehicle and yelled at her to get in the car, asking her how she could set him up. J.K. got in the car, but a marked police car stopped Barnett's car shortly thereafter. Before he got out of the car, Barnett dropped a larger bag of methamphetamine in J.K.'s lap.

¶4 Barnett was charged with sale of a dangerous drug, possession of a dangerous drug for sale, possession of drug paraphernalia, unlawful flight from a law enforcement vehicle, and witness tampering. The trial court granted Barnett's motion for judgment of acquittal on the flight charge. The jury found Barnett guilty of the other four charges, and the court sentenced him as described above.

Waiver of Right to Testify

¶5 Barnett contends the trial court erred when it failed to sua sponte "obtain a personal waiver of right to testify at trial from [Barnett]." Barnett concedes that he failed to raise this issue at trial, thereby waiving the right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005).

¶6 In Arizona, a defendant is not required to make an on-the-record waiver of his right to testify. *See State v. Prince*, 226 Ariz. 516, ¶ 45, 250 P.3d 1145, 1160 (2011); *State v. Gulbrandson*, 184 Ariz. 46, 65, 906 P.2d 579, 598 (1995); *State v. Allie*, 147 Ariz. 320, 328, 710 P.2d 430, 438 (1985). Moreover, in most situations a "*sua sponte* inquiry by the trial court as to whether a defendant desires to testify is neither necessary nor appropriate." *Allie*, 147 Ariz. at 328, 710 P.2d at 438. In certain cases, however, it may be prudent for a trial court to inquire. *Gulbrandson*, 184 Ariz. at 64-65, 906 P.2d at 597-98.

¶7 Barnett primarily contends the Arizona Supreme Court's reasoning in *Allie* and its progeny "was defective," and that his "is the case to make a sea change and improve the criminal justice system with a holding that an accused must be informed on the record of his right to testify and if he waives or invoked that right." We are bound by the decisions of the Arizona Supreme Court, however, and "do not have the authority to modify or disregard its rulings." *State v. Smyers*, 207 Ariz. 314, n.4, 86 P.3d 370, 374 n.4 (2004). We may not disregard our supreme court's holdings

in *Prince*, *Gulbrandson*, and *Allie* that such sua sponte inquiry is generally unnecessary, therefore Barnett's argument fails. [1]

¶8 Barnett also appears to argue that his case was one in which a sua sponte inquiry would have been appropriate, as suggested by the court in *Gulbrandson*. 184 Ariz. at 64-65, 906 P.2d at 597-98. He contends that, on the day the state rested its case, "One [could] not say that any discussion took place at all between defense counsel and [Barnett]." This argument is not supported by the record. On the sixth day of Barnett's trial, the court told Barnett and his counsel, "[W]hat you need to do when I leave here and you have a chance to talk to Mr. Barnett, make a decision if he's testifying because I'll be calling on you immediately after they rest." Later that afternoon, the state rested and the court asked Barnett's counsel if he "need[ed] more time to visit with Mr. Barnett" and suggested they talk privately for five to ten minutes. Immediately following a ten-minute break, the defense rested its case.

¶9 Nothing in the record indicates that Barnett's counsel failed to discuss the issue of Barnett's testifying, nor is there any indication that Barnett did not understand his legal rights. The trial court did not err by failing to inquire on the record about whether Barnett was waiving his right to testify. *See Prince*, 226 Ariz. 516, ¶ 46, 250 P.3d at 1160 (finding defendant's low intelligence and strained attorney relationship did not require on-the-record waiver where defendant asserted legal rights throughout trial and nothing in record suggested he was led to believe he could not testify).

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[1] Barnett cites the Sixth Amendment to the United States Constitution as well as several United States Supreme Court and circuit court cases in addition to the Arizona state cases. To the extent he is raising a separate claim based on the United States Constitution, the result would not change. In the key case on which Barnett relies, *United States v. Pino-Noriega*, 189 F.3d 1089, 1094-95 (9th Cir. 1999), the Ninth Circuit Court of Appeals concluded the district court "has no duty to affirmatively inform defendants of their right to testify, or to inquire whether they wish to exercise that right."

Sufficiency of Evidence for Witness Tampering

¶10 Barnett argues the trial court erred in denying his Rule 20 motion on the witness tampering charge.[2] He contends that telephone calls made to a potential witness did not include threats, bribes, or a plea for help, "as one might expect in witness tampering."

¶11 On a Rule 20 motion, the controlling question is whether there is "substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). We review the sufficiency of the evidence de novo to determine whether, after viewing the evidence in a light most favorable to upholding the jury's verdict, there is sufficient evidence from which "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v.*

[2]Barnett also contends the description of the tampering charge in the indictment was "too vague," lacking identification of the witness or judicial proceeding, but he does not provide any citation to authority in support of this argument. The argument is therefore waived. *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995); Ariz. R. Crim. P. 31.13(c)(1)(vi) ("The appellant's brief shall include . . . [a]n argument which shall contain the contentions of the appellant . . . with citations to the authorities, statutes and parts of the record relied on."). Further, the argument lacks merit. Failure to object to an indictment at least twenty days before trial forfeits the objection absent fundamental, prejudicial error. *State v. Paredes-Solano*, 223 Ariz. 284, ¶¶ 6, 8, 222 P.3d 900, 903, 904 (App. 2009); Ariz. R. Crim. P. 13.5(e), 16.1(b). Barnett cannot demonstrate prejudice here, where the witness and proceeding were apparent in the grand jury transcript, which was filed with the clerk of the superior court more than eight months before trial. *See* Ariz. R. Crim. P. 12.8(c) (transcript filed with clerk within twenty days of grand jury proceedings and made available to defendant and prosecution).

West, 226 Ariz. 559, ¶¶ 15-16, 250 P.3d 1188, 1191 (2011). Section 13-2804(A), A.R.S.,[3] provides the essential elements of the offense:

> A person commits tampering with a witness if such person knowingly induces a witness in any official proceeding or a person he believes may be called as a witness to:
>
> 1. Unlawfully withhold any testimony; or
>
> 2. Testify falsely; or
>
> 3. Absent himself from any official proceeding to which he has been legally summoned.

Further, the word "induce" is given its ordinary meaning, that is, "'to move by persuasion or influence'; 'to call forth or bring about by influence or stimulation'; 'EFFECT, CAUSE'; or 'to cause the formation of.'" *State v. Gray*, 227 Ariz. 424, ¶ 9, 258 P.3d 242, 245 (App. 2011), *quoting* Merriam-Webster's Collegiate Dictionary (11th ed. 2004).

¶12 Here, while Barnett was in jail, he made a telephone call to a person referred to as Dorothy and told her he was going to need her testimony about the day of the offense, specifically when J.K. went to the motel room for the drugs. Dorothy said she remembered that J.K. crossed the street and "went to the room" but she was unsure if J.K. went in the room. The next day, Barnett talked to Dorothy again and told her that when she talked to a lawyer, she would need to "remember" that she saw Barnett leaving the motel and that J.K. "didn't go in the room, as far as you know . . . . She went in Room eight, nine or something, ten. She didn't go—you know what I'm saying?" Barnett's request that Dorothy "remember" something she previously did not recall

[3]Section 13-2804, A.R.S., was recently amended, with a general effective date of July 24, 2014. 2014 Ariz. Sess. Laws, ch. 144, § 2. We refer to the statute in effect at the time of the offense.

provided sufficient evidence for any rational trier of fact to find that Barnett's statements to Dorothy constituted words of tampering intended to influence or otherwise cause Dorothy to testify falsely on his behalf. *See Gray*, 227 Ariz. 424, ¶ 9, 258 P.3d at 245.

¶13 That there was sufficient evidence to establish there had been inducement does not end our inquiry. We have previously held that a conviction for the completed offense of tampering with a witness also requires the state to prove that the witness "altered her conduct or testimony as a result of [the defendant's] conduct." *Id.* ¶ 18. The state concedes, and the record reflects, that Dorothy was never subpoenaed as a witness and did not testify at Barnett's trial; therefore, she did not falsify or withhold her testimony as a result of Barnett's inducement during the telephone calls.[4] Without such proof or proof that Barnett otherwise induced her absence from trial, there was insufficient evidence to support a conviction for the completed offense of tampering with a witness. *Id.* ¶ 18.

¶14 There was, however, sufficient evidence to support a conviction on the lesser-included offense of attempted tampering with a witness. A.R.S. §§ 13-1001, 13-2804. In an appropriate case, we may modify a judgment to reflect a conviction on a lesser-included offense when the verdict on the greater offense necessarily included the elements of the lesser offense. *See Gray*, 227 Ariz. 424, ¶ 18, 258 P.3d at 247; *see, e.g.*, *State v. Garcia*, 138 Ariz. 211, 214, 673 P.2d 955, 958 (App. 1983) (reducing convictions for aggravated assault to convictions for simple assault); *State v. Rowland*, 12 Ariz. App. 437, 438, 471 P.2d 322, 323 (1970) (modifying judgment from first-degree burglary to second-degree burglary). The jury could not have found Barnett guilty of the completed offense of tampering without "implicitly finding, beyond a reasonable doubt, that he had 'attempted' to do so." *Gray*, 227 Ariz. 424, ¶ 18, 258 P.3d at 247.

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[4]Barnett did not raise this issue in his Rule 20 motion before the trial court or on appeal; rather, the state raised the issue in its answering brief. A conviction based on insufficient evidence, however, constitutes fundamental, prejudicial error. *See State v. Stroud*, 209 Ariz. 410, n.2, 103 P.3d 912, 914 n.2 (2005).

Therefore, modification of the judgment is appropriate in this case. *Id.*

Disposition

¶15 We vacate Barnett's conviction and sentence for tampering with a witness, modify the judgment to reflect his conviction for attempted tampering with a witness, a class one misdemeanor pursuant to § 13-1001(C)(6), and remand the case for resentencing on that offense. We otherwise affirm Barnett's convictions and sentences.